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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

GHASSAN ALSUGIRE, Plaintiff and Respondent, v. GERSON BAKAR & ASSOCIATES et al., Defendants and Appellants.	A104072 (San Mateo County Super. Ct. No. 423336)

Defendants Gerson Bakar & Associates, a partnership (GBA), Jalson Co. Inc., doing business as Gerson Bakar & Associates, Crystal Springs Associates, and Gerson Bakar, as an individual, appeal from an order denying their special motion to strike under Code of Civil Procedure section 425.16 (SLAPP [strategic lawsuit against public participation] motion).[1] They contend that plaintiff Ghassan Alsugire failed to establish a probability of prevailing in his action to set aside a default judgment which defendants obtained in a prior unlawful detainer action against him. Defendants Jalson Co. Inc., Crystal Springs Associates, and Gerson Bakar also contend that the trial court erred in considering late-filed evidence offered to show the corporate relationship between the entities in support of Alsugire's claim that these defendants are liable for any damages awarded against GBA. We affirm.

[1] All statutory references are to the Code of Civil Procedures unless otherwise indicated.

Factual and Procedural History

In August 1999, Alsugire entered into a written rental agreement with Crystal Springs Associates to lease an apartment located at 2000 Crystal Springs Road in San Bruno. In the rental application submitted in conjunction with the lease, Alsugire listed his present residence as 3812 Howard Court in South San Francisco. He also listed three telephone numbers as part of his personal data. He designated his present employment as owner of Royal Airport Limousine in South San Francisco and listed the company's telephone number, which was one of the three numbers listed in the personal data section. The two bank statements submitted in support of the application showed the business address for Royal Airport Limousine as 3812 Howard Court in South San Francisco. Although Alsugire left blank the section of the application entitled "other persons to occupy the property," it is undisputed that Alsugire rented the apartment for use by his cousins and that he never intended to live there.

Alsugire's cousins lived in the apartment and paid rent, often with checks drawn on their own accounts, until they were served with a 30-day notice to terminate tenancy on April 14, 2001. The cousins moved out prior to the expiration of the 30-day notice, paid all rent owing at that time, and returned the keys to the on-site rental manager. Alsugire, however, did not personally advise any of the defendants that he had vacated the property.

On May 21, 2001, GBA filed an unlawful detainer action against Alsugire. Unable to serve the summons and complaint on Alsugire personally at the Crystal Springs apartment, GBA applied for an order permitting the posting and mailing of the summons under Code of Civil Procedure section 415.45. GBA's attorney declared, "Other than by publication, or by posting and mailing, [Alsugire] cannot with reasonable diligence be served with the Summons in this action. . . . [¶] I do not know that [Alsugire has] an attorney representing or advising [him] in any matter. [¶] Neither I, nor [GBA], know of [Alsugire's] business address, therefore, cannot attempt to serve [Alsugire] at that address." Based upon this declaration, the court issued an order permitting service of the summons by means of posting the summons at the Crystal Springs apartment and

mailing a copy to the same address. Alsugire did not answer the complaint and, on September 10, 2001, GBA obtained a default judgment against him in the amount of $5,094.98. In January 2002, GBA executed the judgment by levy against Alsugire's bank account.

On August 12, 2002, Alsugire moved for relief from default. He filed a declaration in support of his motion claiming to have learned of the judgment in April 2002 when he received a letter from GBA's attorney. GBA presented evidence that Alsugire actually had knowledge of the lawsuit as early as November 2001 when he called GBA's attorney and inquired into the matter. The trial court denied the motion as untimely.

On June 27, 2003, Alsugire filed the present action to set aside the default judgment and recover the garnished money. Defendants filed their SLAPP motion to summarily dismiss the case, asserting that the action arises out of the exercise of their First Amendment right to petition the government by the filing of their unlawful detainer action. In opposition, Alsugire argued that he was likely to prevail because defendants had obtained the judgment by fraud. Defendants disputed Alsugire's evidence of fraud, and also argued that the evidence related at most to GBA alone. The trial court granted Alsugire's request made at the hearing for leave to submit within three days additional evidence establishing the derivative liability of the other defendants based upon the corporate relationships between the defendants. Defendants were permitted to file a simultaneous response concerning the issue of their interrelationship, but they were not permitted to reply after they had an opportunity to review Alsugire's additional evidence. After receiving a supplemental submission from Alsugire and without additional argument, the trial court denied the motion, finding that Alsugire had established a reasonable probability of success on the merits of his case. Defendants filed a timely notice of appeal.[2]

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[2] After this appeal was fully briefed, this court requested supplemental briefing regarding whether this case should be reclassified as a limited jurisdiction case. The parties

Discussion

Section 425.16, subdivision (b)(1) provides, inter alia, that "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." Section 425.16 posits "a two-step process for determining whether an action is a SLAPP. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. [Citation] . . . If the court finds that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88 (*Navellier*).) We independently review the trial court's order granting a special motion to strike under section 425.16. (*Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 929.)

Alsugire does not dispute that defendants satisfied their initial burden under section 425.16, subdivision (e). "As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in

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acknowledged that an action to set aside a default judgment obtained in a limited jurisdiction case also should be filed as a limited jurisdiction case, and that the compensatory damages requested in this case fall short of the jurisdictional requirement for an unlimited jurisdiction case. (§ 86.) Nonetheless, the parties argue that the action was properly filed as an unlimited jurisdiction case because the claim for punitive damages reasonably could result in an award in excess of $25,000. Since the determination of this issue does not affect the jurisdiction of this court, we deem it advisable to resolve the merits of the pending appeal, and to permit the superior court on remand to determine the appropriate classification of this case.

connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law . . . ." Alsugire's action to set aside the judgment in the underlying unlawful detainer action falls within these provisions. (*Church of Scientology v. Wollershein* (1996) 42 Cal.App.4th 628, 648 [section 425.16, subdivision (e) "literally applies to any direct attack on the *judgment* in the prior action, which resulted from [defendant's] petition activity"], overruled on other ground in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 20 Cal.4th 53, 68, fn. 5.)

Alsugire contends, however, that he has satisfied his burden of demonstrating a probability of prevailing. "[I]n order to establish the requisite probability of prevailing (§ 425.16, subd. (b)(1)), the plaintiff need only have ' "stated and substantiated a legally sufficient claim." ' [Citations.] 'Put another way, the plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." ' " (*Navellier*, *supra*, 29 Cal.4th at pp. 88-89.)

1. <u>*Alsugire demonstrated a probability of prevailing against GBA.*</u>

Alsugire asserts that his evidence established that GBA committed extrinsic fraud in securing the order permitting substitute service of the summons and complaint in the unlawful detainer action. A judgment may be vacated on the ground of extrinsic fraud where it appears that there was a willful failure to give the required service, that willfully false affidavits of service were filed, or that there has been a willful failure to exercise the degree of diligence required by law in connection with personal service. (*Bennett v. Hibernia Bank* (1956) 47 Cal.2d 540, 558; *Stern v. Judson* (1912) 163 Cal. 726, 735-736.) In *Stern v. Judson, supra,* at page 736, the court held that a judgment was properly set aside where the evidence demonstrated that "the investigation which the appellant claims to have made to ascertain the whereabouts of a number of persons against whom he contemplated suit, including this respondent, was a mere perfunctory one; amounting to no more than a mere form of investigation which of itself would indicate lack of good faith in making it. When, in addition, there is taken into consideration that there were sources from which he could obtain information if his inquiry had been pursued with

ordinary care and candor, as the law requires he shall exercise, and other sources of which he had knowledge, or should have had, from which the residence and whereabouts of the defendant might have been ascertained, there can be no question but that the findings of the court that the appellant had not used due, reasonable or *bona fide* diligence to ascertain the whereabouts or address of respondent and that his statements in the affidavit that he had were false and untrue, are sufficiently sustained by the evidence."

Alsugire argues that GBA's assertion to the court that it had exercised due diligence in attempting to locate and serve him was fraudulent. He contends that GBA and its attorney fraudulently declared, "Neither I, nor plaintiff, know of defendant's business address, therefore cannot attempt to serve defendant at that address." GBA attempted to serve Alsugire personally eight times over four days at varying hours of the day, but all of these attempts were made only at the Crystal Springs apartment. There was no attempt to serve Alsugire at the business address listed in the rental application, or to contact him by telephone at any of the three telephone numbers listed in the application. As in *Stern v. Judson, supra,* 163 Cal. at page 736, GBA's failure to make even a perfunctory investigation to ascertain the whereabouts of Alsugire despite having the information necessary to do so is evidence of a lack of good faith. Moreover, GBA expressly misrepresented to the court that it did not have a business address for Alsugire and no reasonable means of locating him when it had not attempted service on the business address it had or even made a simple telephone call to confirm the business address. Had it done so, it would have learned Alsugire's current address and it would have been able to properly serve him.[3] These failures are even more significant in light of the evidence that the keys to the property had been returned to the property manager and no one took any steps to confirm whether the apartment had been vacated.

[3] We note that defendants' attorney apparently was able to locate Alsugire in April 2002 after the default judgment had been entered and Alsugire's bank account levied.

GBA contends that it was not required to attempt service at the listed business address because that address was the same as the address Alsugire listed as his current residence and it was therefore entitled to assume that the business address was no longer current once Alsugire rented the Crystal Springs apartment. We cannot say as a matter of law that GBA was justified in making such an assumption, particularly since the assumption could have been verified by a single telephone call. Accordingly, Alsugire satisfied his burden under section 425.16 as to GBA.

2. *Alsugire demonstrated a probability of prevailing as to the remaining defendants.*

Defendants contend that even if the trial court properly denied the motion as to GBA, Alsugire's opposition failed to connect Crystal Springs Associates, Gerson Bakar and Jalson Co. Inc. to the underlying unlawful detainer action, and that the trial court erred in allowing Alsugire to remedy this defect with the supplemental submission of inadmissible evidence. Initially, we reject defendants' contention that "plaintiffs are not entitled to post-hearing submissions of evidence they should have filed in opposition to the SLAPP motion." As a general rule, " 'a trial court has inherent power, independent of statute, to exercise its discretion and control over all proceedings relating to the litigation before it [citation]. One phase of such power "necessary to the orderly and efficient exercise of jurisdiction" [citation] is the power to obtain evidence upon which the judgment of the court may rest [citation]. In this case, the additional or supplemental [declaration and supporting documents] were the means whereby the trial court received for its guidance and consideration evidentiary facts, and reception thereof constituted a proper exercise of the inherent power of the court." (*Weiss v. Chevron, U.S.A., Inc.* (1988) 204 Cal.App.3d 1094, 1098-1099, quoting *Johnson v. Banducci* (1963) 212 Cal.App.2d 254, 260.) Accordingly, while the moving party is entitled to rely on the plaintiff's failure to meet its burden of proof and need not submit additional evidence in its reply, the court retains the discretion to permit the submission of additional evidence under the proper circumstances.

Navellier v. Sletten (2003) 106 Cal.App.4th 763, 775-776, relied upon by defendants, is not to the contrary. In *Navellier*, the plaintiffs failed to present any

evidence of damages in support of their claim for breach of contract and relied instead on the unverified allegations in the complaint to satisfy their burden under section 425.16. The court found the unsupported allegations insufficient and rejected plaintiffs' request that they be given an opportunity to produce the requisite evidence on remand to the trial court. (106 Cal.App.4th at pp. 775-776.) Nothing in *Navellier* suggests, however, that a trial court abuses its discretion when it grants a party leave to file supplemental evidence prior to ruling on the motion.

In exercising its discretion to receive late-filed evidence, however, the trial court must also consider the opposing party's due process rights. (*San Diego Watercrafts, Inc., v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 316 [consideration of evidence submitted with reply to motion for summary judgment violated opposing party's due process rights because opposing party not given notice or opportunity to respond]; *Alvak Enterprises v. Phillips* (1959) 167 Cal.App.2d 69, 74-75 [affidavits filed after submission upon consent obtained at the hearing of the motion properly may be considered by the court because opposing party had notice of the new evidence and opportunity to respond].) The simultaneous submissions that the trial court authorized here did not provide defendants with a sufficient, or any, opportunity to respond to Alsugire's evidence. The court required defendants to address Alsugire's showing as to the defendants other than GBA without knowing what the showing would be. In denying defendants the opportunity to respond to Alsugire's evidence after reviewing that evidence, the trial court abused its discretion.[4] Nonetheless, in light of the nature of the evidence that Alsugire presented, we do not believe that the error in this respect was prejudicial.

Even without the supplemental evidence, the evidence that Alsugire initially submitted in opposition to defendants' motion was sufficient to establish the potential liability of Crystal Springs Associates. Alsugire's declaration states that despite the fact

[4] Moreover, contrary to Alsugire's contention, defendants did not waive their objections to the admissibility of the evidence because they were not given an opportunity to object.

that the GBA was the named plaintiff in the unlawful detainer action, the lease he signed named Crystal Springs Associates as the landlord. For purposes of the prima facie showing required to overcome the SLAPP motion, this evidence was sufficient to indicate that GBA was acting as an agent for Crystal Springs Associates in bringing the unlawful detainer action.

Beyond that, the supplemental declaration submitted by Alsugire's attorney states, "Before filing suit in this action, I accessed the Lexis/Nexis database on the internet in order to investigate the ownership of the apartment complex where the unit in question in this action is located, as well as the status and constituency of the named defendants. Said database is a compilation of public information generally used and relied upon as accurate in the course of my business as an attorney, and by attorneys generally, within the meaning of Evidence Code section 1340." The declaration details the results of the attorney's search, including the disclosure that Crystal Springs Associates is the owner of the Crystal Springs Apartments, Gerson Bakar is the general partner of Crystal Springs Associates, and Jalson Co., Inc. doing business as Gerson Bakar & Associates is a limited partner in Crystal Springs Associates. Alsugire's attorney attached the Lexis/Nexis printouts as exhibits to his declaration.

Evidence Code section 1340 reads, "Evidence of a statement, other than an opinion, contained in a tabulation, list, directory, register, or other published compilation is not made inadmissible by the hearsay rule if the compilation is generally used and relied upon as accurate in the course of a business as defined in Section 1270." "The first requirement of section 1340 is that the offered evidence must be a statement (other than an opinion) contained in a published compilation. . . . [¶] The second requirement is that the compilation must be generally used and relied upon as accurate in the course of a business . . . . We interpret the second requirement to mean that the compilation must be relied upon as accurate with respect to the statement or class of statements being offered into evidence. [¶] We base our interpretation on the justification for this hearsay exception—the trustworthiness of these compilations. Trustworthiness is reasonably assured by the fact that the business community generally uses and relies upon the

compilation and by the fact that its author knows the work will have no commercial value unless it is accurate. [Citations.] It necessarily follows that where a hearsay statement is to be excepted under [Evidence Code] section 1340 there must be a showing either that this particular statement was generally used and relied upon as accurate in the course of business or that the particular statement is of a class of statements which is generally used and relied upon in the course of business. . . . Thus, it would be enough if the foundational testimony established that businesses had actually relied on the accuracy of the specific entry which the proponent of the published compilation seeks to introduce." (*Miller v. Modern Business Center* (1983) 147 Cal.App.3d 632, 635, fn. omitted.)

Alsugire's attorney laid the necessary foundation for the admission of the Lexis printouts. Defendants do not dispute that attorneys, including Alsugire's attorney, generally rely on the information of corporate ownership provided by Lexis as accurate and reliable. Contrary to defendants' assertion, the disclaimer found on the Lexis printouts does not render the attorney's reliance on the information unreasonable under Evidence Code section 1340. The disclaimer reads, "This data is for informational purposes only. Certification can only be obtained through the issuing government agency." Certification of the information contained in the printout is not necessary to establish the corporate structure of Crystal Springs Associates. Certification is merely a means of authenticating the information contained in the document. (Evid. Code, § 1531; Epstein et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2003) ¶ 8:325 [certified copies of pubic records presumed authentic].) Defendants do not dispute the authenticity of the Lexis publication of the information provided by the Office of the Secretary of State. (See *Florida Conf. Seventh-Day Adventists v. Kyriakides* (C.D.Cal. 2001) 151 F.Supp.2d 1223, 1225, fn. 3 [Lexis printout of SEC report authenticated based upon appearance of document and context in which information was obtained]; see also *S.E.C. v. Poirier* (D.Ariz. 2001) 140 F.Supp.2d 1033, 1046, fn. 11 [consent judgment available on Lexis is admissible under Arizona Rules of Evidence, rule 901(b)(7), which provides for the authentication of compilations of public records.];

Mindscape, Inc. v. Media Depot, Inc. (N.D.Cal. 1997) 973 F.Supp. 1130, 1132 [relying on document printed from U.S. Patent database on Westlaw].)

Thus, although the trial court improperly denied defendants the opportunity to object and respond to Alsugire's evidence concerning the additional defendants, it is apparent that no harm was done. There was no basis for an evidentiary objection to the materials attached to counsel's supplemental declaration, which demonstrated a basis on which the additional defendants might be liable. Since such a prima facie showing is sufficient to require denial of the SLAPP motion, no prejudice resulted from the fact that defendants had no opportunity to submit additional or opposing evidence.

Disposition

The order denying the special motion to strike is affirmed. Alsugire shall recover his costs on appeal.

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Pollak, J.

We concur:

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McGuiness, P. J.

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Corrigan, J.